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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-927

BANKERS LIFE & CASUALTY COMPANY,

Petitioner,

vs.

THE VILLAGE OF NORTH PALM BEACH, FLORIDA, etc., et al.,

Respondents.

REPLY OF THE TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA, RESPONDENTS, IN OPPOSITION TO THE PETITION OF BANKERS LIFE & CASUALTY COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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Trustees of the Internal
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Tallahassee, Florida 32304

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Respondents, State of Florida Board of Trustees of the Internal Improvement Trust Fund, request that after a review of this matter, the Petitioner's request for a writ of certiorari will be denied on the grounds that there is no basis for the issuance of such writ.

(a) Question presented.

Whether, under the circumstances of this case, any issues were raised which would justify the granting of a writ of certiorari.

(b) Statutes involved.

Rivers and Harbors Act, 33 U.S. Code §403.

National Environmental Policy Act of 1969, 42 U.S. Code §§4331-4347.

STATEMENT OF THE CASE

Bankers Life & Casualty Company, petitioner, was granted a permit under 33 U.S. Code §403 by the United States Army Corps of Engineers in 1957 to fill approximately 194 acres of submerged land in Lake Worth, Palm Beach County, Florida. This permit expired in 1960, but was extended by the Corps of Engineers through December 31, 1963. Shortly prior to that date, Bankers Life requested another extension of that permit, but since the Village of North Palm Beach objected to the issuance of that permit, the Corps of Engineers delayed action on the petitioner's request until Bankers Life received authorization from state and local authorities.

It was not until December 6, 1968, and later on March 17, 1969, that the petitioner, Bankers Life, corresponded with the Village of North Palm Beach in an attempt to obtain a local fill permit. On July 10, 1969, possibly believing the Village of North Palm Beach had granted approval for its application, Bankers Life requested

the Corps of Engineers to grant approval of its request for an extension of its last permit which expired December 31, 1963. The Corps of Engineers requested Bankers Life to furnish written approval from the State of Florida Board of Trustees of the Internal Improvement Trust Fund before they took any action. Shortly thereafter, Bankers Life filed a suit for mandatory injunction against the Secretary of the Army on behalf of the U. S. Army Corps of Engineers, State of Florida Board of Trustees of the Internal Improvement Trust Fund, and the Village of North Palm Beach and asked the District Court to require the federal defendant to issue a dredge and fill permit and to quiet title to the property in question between the state and local defendants in the petitioner.

The District Court granted the petitioner all relief requested; however, the U. S. Court of Appeals for the Fifth Circuit reversed, dismissing the U. S. Army Corps of Engineers as a defendant and remanding the state defendants for further proceedings to resolve questions of state law.

ARGUMENT

UNDER THE FACTS OF THIS CAUSE THERE ARE NO ISSUES RAISED WHICH WOULD JUSTIFY THE GRANTING OF A WRIT OF CERTIORARI AS REQUESTED IN BANKERS LIFE'S PETITION.

A. Ruling of the Court of Appeals as to the Corps of Engineers.

The crux of the opinion of the United States Court of Appeals for the Fifth Circuit dismissing the Corps of Engineers as a defendant is that during the period of time between December 31, 1963, when Bankers Life's last permit expired, and the date it filed suit in U. S. District Court in 1969, the responsibility of the U. S. Army Corps of Engineers in handling permit applications had greatly changed. This change was due to the passage of the National Environmental Policy Act of 1969, 42 U.S.C. §§4331-4347. That Act was interpreted by the Fifth Circuit in *Zabel v. Tabb*, 430 F.2d 199 (C.A.5, 1970), cert. den., 401 U.S. 910, where the Court said:

> "This Act essentially states that every federal agency shall consider ecological factors when dealing with activities which may have an impact on man's environment.
>
> "Although this Congressional command was not in existence at the time the permit in question was denied, the correctness of that decision must be determined by the applicable standards of today."

Under those circumstances, the District Court should not have ordered the Corps of Engineers to summarily grant a permit to the petitioners as the requirements for permitting procedures had greatly changed since Bankers Life's original permit application in 1957. The Fifth Circuit Court of Appeals was correct in recognizing that the National Environmental Policy Act of 1969 changed the duties of the Corps of Engineers with respect to the treatment of dredge and fill permit applications. The Corps of Engineers became bound to consider Bankers Life's request for a permit in the light of that new legislation and had no obligation to automatically comply with Banker's request. The Court of Appeals interpreted the posture of the case as not ripe for judicial determination and properly dismissed the Corps as a party.

The above issue presents no novel issue of law, nor any situation remotely close to Rule 19 of the Rules of the Supreme Court of the United States.

B. Ruling as to the state defendants.

The opinion of the United States Court of Appeals for the Fifth Circuit, after disposing of the federal appeal, remanded the issue back to the District Court for resolution of issues of state law. That decision was based largely upon a misstatement of the facts on the part of the District Court.

> "A careful reading of this record leaves us without any doubt that the date of June 11, 1957 was so critical with respect to the time of the commencement of the filling

> of the submerged lands that it is incomprehensible to this court how much misstatement of the facts could occur.
>
> "However it may be, the finding of the trial court is clearly erroneous, for it is contrary to the stipulation entered into by the parties. Because of this fact, the judgment of the trial court to the effect that the exemption covered Bankers by reason of the commencement of filling prior to June 11, 1957 cannot be the basis for a judgment or decree interpreting the Florida Statute. We consider it appropriate that this entire issue be remanded to the trial court for further consideration in light of the facts as disclosed by the record."

Where the ruling of the U. S. Court of Appeals reversing the District Court's judgment is based on the District Court's misinterpretation of undisputed facts, that cause presents no issue justifying the granting of a writ of certiorari.

CONCLUSION

The ruling of the Fifth Circuit Court of Appeals dismissing the Corps of Engineers as a party recognized that between 1963, when Bankers' permit expired, and 1969, when Bankers requested a new permit, the duties of the Corps of Engineers had changed. These additional responsibilities prevented an automatic renewal of Bankers' permit after a lapse of five years.

The District Court did not correctly apply the stipulated facts to arrive at its order with regard to the state defendants. Since these facts were crucial to the issue, the Court of Appeals correctly remanded the remaining parties to that court to resolve those issues and questions of state law which applied thereto.

All the above-raised questions of law and fact, which under Rule 19 of the United States Supreme Court are properly handled at the Circuit Court of Appeals. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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